93-366

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

JOSEPH MOUAWAD, a/k/a JOSEPH MOAWADH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In light of a conflict between Federal Circuit Court decisions and the recurring nature of the issue, should this Court pronounce a "bright-line" rule that *Jencks* material must be provided at a sentencing hearing under the Sentencing Guidelines?

2. In an inevitably recurrent situation, should a district court have authority to grant a downward departure pursuant to §5K2.0 of the Sentencing Guidelines absent a government motion when a defendant provides cooperation to the government that by its very nature is not designed to assist in other prosecutions?

PARTIES TO THE PROCEEDINGS

Elias Farah, Michael Nicholas, Mary Anne Hanna, Almaza Latouf and Joseph Mouawad, a/k/a Joseph Moawadh were the co-defendants in this matter and the defendants-appellants to the United States Court of Appeals for the Second Circuit.

This petition for a Writ of Certiorari is respectfully submitted on behalf of Joseph Mouawad, a/k/a Joseph Moawadh.

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IN THE

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JOSEPH MOUAWAD, a/k/a JOSEPH MOAWADH,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

On April 20, 1993, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. On May 3, 1993, petitioner submitted a petition for rehearing with a suggestion for rehearing *en banc* to the United States Court of Appeals for the Second Circuit. The petition for rehearing was denied on June 7, 1993, and no judge requested that a vote be taken on petitioner's suggestion for rehearing *en banc*. The decision of the United States Court of Appeals for the Second Circuit created a conflict with a decision of another United States Court of Appeals on the same matter.[1]

This Court has jurisdiction to review the judgment in question pursuant to 18 U.S.C. §1254.

[1] *See* Rule 10.1(a) of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves interpretation of the Fifth and Fourteenth Amendments to the United States Constitution (set forth respectively in the following two paragraphs):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

This case also refers to Title 18 U.S.C. §3500:

§3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial

is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

* * *

Sections 5K1.1 and 5K2.0 of the Sentencing Guidelines are also involved in this case. The Sentencing Guidelines have been compiled in Title 18 U.S.C. Appendix 4. Sections 5K1.1 and 5K2.0 provide as follows:

PART K—DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

2. OTHER GROUNDS FOR DEPARTURE:

§5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. §3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (*e.g.*, as specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guidelines level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present

to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

* * *

STATEMENT OF THE CASE

On September 30, 1988, petitioner Joseph Mouawad pled guilty to one count of knowingly and intentionally possessing with intent to distribute an amount of heroin in excess of one hundred (100) grams, and one count of knowingly and willfully transporting and attempting to transport cashiers' checks from a place in the United States to a place outside the United States with the intent to promote the distribution of narcotics. The District Court exercised jurisdiction pursuant to Title 18 U.S.C. §3231.

Prior to sentencing, a hearing was held pursuant to *United States v. Fatico,* 603 F.2d 1053 (2d Cir. 1979), *cert. denied,* 444 U.S. 1073 (1980), and testimony was received from government witnesses. Defense counsel requested debriefing notes or statements pursuant to Title 18 U.S.C. §3500 ("Jencks Act") and on due process grounds. This request was denied. Furthermore, petitioner's request to withdraw his guilty plea was denied.

Mr. Mouawad was sentenced to concurrent terms of 292 months and four years supervised release on the narcotics count and four years supervised release on the money laundering count. On appeal, the Second Circuit affirmed this decision, and petitioner's petition for rehearing with suggestion for rehearing *en banc* was denied.

Petitioner, Joseph Mouawad respectfully asks this Court to issue a writ of certiorari in this matter because the Second Circuit decision with respect to the production of *Jencks* material at a sentencing hearing under the Sentencing Guidelines conflicts with the decisions of the only two other federal courts to address the issue. In addition, the District Court failed to properly analyze petitioner's cooperation pursuant to §5K2.0 of the Sentencing Guidelines, and this Court should address this issue as well.

ARGUMENT

I. The Second Circuit's Decision Affirming the Refusal to Provide *Jencks* Material at the Sentencing Hearing Conflicts with the Only Other Federal Court Decisions Addressing the Issue.

A. Introduction

This case allows this Court to resolve an inter-circuit conflict, and pronounce a "bright-line" rule regarding a recurring issue. Specifically, this Court should rule that *Jencks* material must be provided at a sentencing hearing under the Sentencing Guidelines.

A dramatic paradigm shift is unmistakably occurring in federal criminal law. The promulgation of the Sentencing Guidelines in the late 1980s has effectively changed the focus for federal criminal defendants. Although fact-finding during sentencing previously paled in comparison with fact-finding at trial or even at pre-trial hearings, today this is no longer true.

Indeed, in cases like the one at bar, defendants are sentenced based on facts outside the parameters of the guilty plea or the proof at trial. Findings of fact made at sentencing hearings often force the wooden application of a hand-carved grid to formulate the amount of time that a defendant must spend behind bars. Simply stated, in cases that go to trial, the sentencing hearing is often as important to the convicted defendant as the trial itself; in cases involving a guilty plea, like the one at bar, the sentencing hearing is clearly the most important proceeding in the case.

Especially in light of this evolution in federal criminal law, the United States Court of Appeals for the Second Circuit erred in affirming the trial court's decision to

deny petitioner vital *Jencks* material at the sentencing hearing. The Second Circuit's findings—in conflict with the only other federal decisions addressing the issue—will further constrict the rigid sentencing grid. Moreover, the inter-circuit conflict that has now been created will result in persistent appeals on this issue which will, in turn, waste precious judicial resources.

B. The Conflict

In *United States v. Rosa*, 891 F.2d 1074 (3rd Cir. 1989), the Third Circuit held that the valuable cross-examination material provided under the Jencks Act must be given to the defendant at the sentencing hearing. The court noted that the newly enacted Sentencing Guidelines made its conclusion even more compelling:

> In those cases, the judge has much less leeway to moderate a sentence based upon perceived weaknesses in the government's case, but rather is obliged to sentence within Guideline range based upon specific fact findings which need not be made beyond a reasonable doubt . . . and which need not be based upon evidence which is admissible . . . .
>
> —— * * * * *
>
> The severity of the sentence will depend solely on what is demonstrated . . . at the sentencing hearing. In such a circumstance, the need by a defendant for prior statements made by government witnesses called to testify against him, may be even more imperative in the future when his sentence is mandated by the *Guidelines*.

891 F.2d at 1079 & n.3.

The Third Circuit's conclusion in *Rosa* was applied to a Sentencing Guidelines case in *United States v. Ameperosa*, 728 F. Supp. 1479, 1481-83 (D. Hawaii 1990). In language remarkably pertinent to the present case, the Court held that:

> the rationale of *Jencks v. United States* and the purpose of the Jencks Act itself would be disserved if the Government at such a grave stage of a criminal proceeding could deprive the defendant of material valuable to his very liberty.

Ameperosa, 728 F. Supp. at 1482. The Court also noted "an important practical consideration" favoring this result in cases where, as here, the defendant has pled guilty:

> If a trial court were to deny defendants' motions to compel the Government to produce such material at a sentencing hearing, in the future defendants could simply do an end-run around such a rule by merely postponing their plea of guilty until after the production of Jencks Act material .... Such a practice would constitute a clear waste of judicial resources as well as provide added expense to both the Government and the criminal defendant.

728 F. Supp. at 1482-83.

In marked contrast to the decisions of both the Third Circuit and the United States District Court for the District of Hawaii, the Second Circuit decided in the case at bar that Jencks Act material need not be provided at sentencing hearings conducted under the Guidelines. For the reasons so eloquently stated by the Third Circuit and Hawaii District Court, the Second Circuit's decision is in error. It is respectfully submitted that this Court should therefore address—and correct—the Second Circuit's disagreement with the other federal courts which have decided the issue.

Indeed, in the present case, depriving the defendant of valuable *Jencks* material for cross-examination at the sentencing hearing was particularly harmful. During the final segment of the sentencing hearing, Agent St. Hillaire—the law enforcement officer whose hearsay testimony provided the bulk of the evidence at the sentencing hearing—admitted lying under oath during previous testimony given in this case because he was "incensed" at one of the defendants. *See* Second Circuit Appendix at 209a-211a. Moreover, that same agent died of a heroin overdose shortly after the final segment of the sentencing hearing. Given these circumstances—unusual to say the least—regarding the government's key witness at the sentencing hearing, both the Jencks Act and due process required the government to provide the defendant with prior statements so that his attorney could effectively cross-examine the witness.

This Court should therefore rule that *Jencks* material must be provided in sentencing hearings conducted under the Guidelines. If such hearings are indeed to be quests for the truth unencumbered by technical rules of evidence, then at a minimum the defendant and his attorney must be given valuable cross-examination material with which to probe the truth of testimony given by government witnesses.[2]

[2] The Second Circuit suggested that because the prosecution gave *Jencks* material to the District Court for *in camera* review, no error occurred here. Because the District Judge is not an advocate, however, such procedure is clearly insufficient to protect the defendant's constitutional or statutory rights. With all due respect to the bench, only the defendant's advocate can truly decide when, whether and how to use witnesses' statements as part of cross-examination. "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis v. United States*, 384 U.S. 855, 875 (1966).

II. The District Court Failed to Properly Analyze Petitioner's Cooperation Pursuant to §5K2.0 of the Sentencing Guidelines.

Because of the importance of this sentencing issue and the likelihood of its recurrence, this Court should grant a writ of certiorari to address it. While it is true that the District Court recognized its ability to depart downward under §5K2.0, it analyzed the issue only in terms of §5K1.1-type cooperation. In doing so, the District Court incorrectly imposed a standard of extraordinary circumstances and mistakenly believed that it lacked authority to depart absent such circumstances. This is an incorrect reading of the law with respect to the type of cooperation at issue here, and the Second Circuit erred in not remanding the case for reconsideration in light of the proper standard.

It is important to note the distinction between §5K1.1-type cooperation and §5K2.0-type cooperation with respect to this issue. In fact, it was this distinction that has apparently eluded the government, the District Court and the Second Circuit. Under §5K1.1, a government motion is necessary to depart with respect to information provided by a defendant which is designed to assist the government in the investigation and prosecution of other offenses. Because there was no such government motion here, the District Court found that it could not depart under §5K1.1 absent truly extraordinary circumstances.

But Mr. Mouawad provided two types of cooperation. He provided cooperation designed to assist in other prosecutions (§5K1.1-type cooperation), and he also provided information regarding the location of the American hostages in Lebanon—a type of cooperation

not contemplated by the Sentencing Commission under §5K1.1. Hence, while the District Court may have properly analyzed the issue with respect to the cooperation designed to assist other prosecutions, it clearly did not properly address the §5K2.0 issue. Apparently the District Court did not realize that it had authority to depart for §5K2.0-type cooperation without government motion with respect to Mr. Mouawad's assistance in locating American hostages in Lebanon.

In other words, while the Court realized it had authority to depart downward, it did not recognize the fact that the *type of cooperation* provided by Mr. Mouawad obviated the necessity of a motion by the government before it could do so. In fact, because this type of information was by its very nature not designed to assist in another prosecution, the government *could not* have made a §5K1.1 motion. The Court's belief that it *could not* depart under §5K2.0 absent *either* a motion by the government *or* extraordinary circumstances was therefore misplaced: there could have been no government motion here, and there should therefore have been no standard of extraordinary circumstances.

Indeed, the Second Circuit's decision in this case conflicts with the analysis applied by that Court in a similar situation in *United States v. Khan*, 920 F.2d 1100, 1106-07 (2d Cir. 1990). In that case, the Court first noted that absent a government motion under §5K1.1, the District Court was "generally" not empowered to depart downward for cooperation designed to assist in another's prosecution. The Second Circuit expressly held, however, that the defendant's assistance in locating a kidnapped DEA confidential informant empowered the District Court to depart downward under §5K2.0 "notwithstanding the government's decision not to move

for a departure under §5K1.1." 920 F.2d at 1107. Because the defendant in *United States v. Khan* never brought his cooperation to the attention of the District Court before sentencing, however, the Second Circuit reluctantly affirmed the conviction.

In the present case, on the other hand, Mr. Mouawad brought cooperation identical to that in the *Khan* case to the attention of the District Court prior to sentencing. Consequently, the District Court could have departed without government motion under §5K2.0, even if there were no extraordinary circumstances, but apparently it did not realize this. Instead, the District Court limited its analysis to possible departure for §5K1.1-type cooperation, and found that it could depart only under extraordinary circumstances. Especially in light of the District Court's express belief that the sentence imposed, though required under the Sentencing Guidelines, was unfair, this error should have been corrected by the Circuit Court. This Court should therefore grant certiorari not only to correct an injustice in this case, but also to decide an important, and inevitably recurrent, federal sentencing issue.

CONCLUSION

It is respectfully requested that this Court grant the petition for a writ of certiorari in this case.

DATED: Buffalo, New York
September 2, 1993

Respecfully submitted,

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APPENDIX A

Summary Order Issued by the United States Court of Appeals for the Second Circuit on April 20, 1993, Affirming Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of April one thousand nine hundred and ninety-three.

Nos. 89-1478, -1557, -1576, -1618

Present:
HONORABLE WILLIAM H. TIMBERS,
HONORABLE AMALYA L. KEARSE,
HONORABLE GEORGE C. PRATT,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH MOUAWAD, MARY ANN HANNA, ALMAZA LATOUF, and MICHAEL NICHOLAS,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of New York.

These causes came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and were argued by

counsel for appellee and for defendants-appellants Mouawad and Latouf, and were submitted by counsel for defendants-appellants Nicholas and Hanna.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

Defendants Joseph Mouawad, Mary Ann Hanna, Almaza Latouf, and Michael Nicholas, along with defendant Elias Farah whose appeal will be dealt with separately, appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York, following their pleas of guilty before Raymond J. Dearie, *Judge,* on various counts of narcotics distribution and money laundering. On appeal, defendants raise a number of challenges to their sentences under the federal Sentencing Guidelines ("Guidelines"). For the reasons below, we conclude that their contentions have no merit.

1. MOUAWAD: Mouawad was convicted on one count of possession with intent to distribute more than 100 grams of a substance containing heroin, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(i), and one count of transporting monetary instruments out of the country, in violation of 18 U.S.C. §§1956(a)(2)(A) and 2. He was sentenced principally to a total of 292 months' imprisonment, to be followed by a four-year term of supervised release. On appeal, Mouawad contends principally that the district court erred in (1) calculating his base offense level with reference to all of the organization's narcotics and currency, (2) enhancing his offense level pursuant to Guidelines §3B1.1(a) for his leadership role and pursuant to §3C1.1 for obstruction of justice, (3) refusing to order the government to provide

him with Jencks Act material for the sentencing proceedings, and (4) failing to depart downward from the Guidelines' prescribed sentencing range. He also raises a number of constitutional challenges to the district court's application of the Guidelines.

With respect to sentencing, the government is required to establish the facts on which it relies by a preponderance of the evidence, *see United States v. Santiago*, 906 F.2d 867, 871 (2d Cir. 1990); *United States v. Shoulberg*, 895 F.2d 882, 886-87 (2d Cir. 1990); *United States v. Guerra*, 888 F.2d 247, 251 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990). "[U]nless they are clearly erroneous," we must accept the findings of fact of the district court, 18 U.S.C. §3742(e), including its findings as to the quantity of narcotics involved in a transaction, *see, e.g., United States v. Cousineau*, 929 F.2d 64, 67 (2d Cir. 1991), the quantity reasonably foreseeable to a given defendant, *see, e.g., United States v. Rivera*, 971 F.2d 876, 892 (2d Cir. 1992), the defendant's role in the offense, *see, e.g., United States v. Adames*, 901 F.2d 11, 13 (2d Cir. 1990); *United States v. Rios*, 893 F.2d 479, 481 (2d Cir. 1990), and whether the defendant engaged in conduct that may have constituted an obstruction of justice, *see, e.g., United States v. Shoulberg*, 895 F.2d at 886-87. We see no clear error in the district court's findings with respect to Mouawad.

The court found, *inter alia*, that Mouawad's trips to the United States generally coincided with heroin importations, that Hanna sought assistance from him in collecting funds, and that coconspirators, including Hanna, the leader of the organization's operations in the United States, treated him with deference. These findings, which were supported by the evidence, in turn supported the court's conclusion that Mouawad was

"the" leader of the organization and the court's increase of his offense level by four steps pursuant to §3B1.1(a) for his leadership role in the organization. Further, the court's findings that Mouawad had been involved in the organization's operations from beginning to end, that he was its leader, and that all of its importation activity should be imputed to him, justified the court's conclusion that all of the heroin imported and money laundered by the organization should be included in the calculation of his offense level. The court's findings that Mouawad repeatedly threatened witnesses are also supported by the record and warranted the enhancement for obstruction of justice.

Prior to the adoption of the Guidelines, the government had no obligation to produce Jencks Act material during sentencing. *See, e.g., United States v. Fatico,* 603 F.2d 1053, 1058 (2d Cir. 1979), *cert. denied,* 444 U.S. 1073 (1980). We see no indication that the Sentencing Commission intended to alter this principle. In any event, in the present case, the government resisted producing the material to the defendants in order to protect the identity of a confidential informant and instead furnished it to the court for *in camera* review. The court found no conflict between the Jencks Act material and the testimony. In the circumstances, we see no abuse of discretion in the court's refusal to require the government to release the Jencks Act material to defendants.

Mouawad's contention that the district court erred in failing to depart from the sentencing range prescribed by the Guidelines on the ground that he assisted in locating hostages in Lebanon is not reviewable on appeal. A refusal to depart is not appealable unless the court mistakenly believed it had no power to depart. *See, e.g.,*

United States v. Mickens, 977 F.2d 69, 72 (2d Cir. 1992); *United States v. Ritchey*, 949 F.2d 61, 63 (2d Cir. 1991) (per curiam); *United States v. Richardson*, 923 F.2d 13, 15 (2d Cir. 1991). The court here did not decline to depart because it believed that it lacked the authority to do so. Rather, it stated that it would not depart on the basis requested because such a departure was not warranted. Accordingly, the refusal to depart is not reviewable.

Mouawad's constitutional challenges to the Guidelines have no merit. A court may, consistent with due process, sentence a defendant based on uncharged conduct. *See, e.g., United States v. Guerra*, 888 F.2d at 251; *see also United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 181-82 (2d Cir.), *cert. denied*, 498 U.S. 844 (1990) (defendant may be sentenced based on acquitted conduct). Because Mouawad's relevant criminal conduct occurred both before and after the enactment of the Guidelines, the court did not violate the Ex Post Facto Clause by considering pre-Guidelines conduct in calculating Mouawad's offense level. *See United States v. Story*, 891 F.2d 988, 995 (2d Cir. 1989). Finally, Mouawad's sentence, which was within the statutory range, was not disproportionate to his conduct and did not violate the Eighth Amendment. *See, e.g., United States v. Mitchell*, 932 F.2d 1027, 1028-29 (2d Cir. 1991).

2. HANNA: Hanna was convicted on one count of possession with intent to distribute more than one kilogram of a substance containing heroin, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(A)(i), and one count of transporting monetary instruments out of the country, in violation of 18 U.S.C. §§1956(a)(2)(A) and 2. She was sentenced principally to a total of 292 months' imprisonment, to be followed by a five-year term of supervised release. On appeal, Hanna, in addition to

asserting an untenable Jencks Act contention similar to that rejected above, contends principally that the district court erred in (a) adjusting her offense level upward for obstruction of justice, and (b) refusing to grant her a downward departure for cooperation.

The record included evidence that Hanna gave government agents false information as to the location of drugs, which the agents used in obtaining search warants, and that she falsely accused one "Poor Boy" of involvement in the narcotics operation. The district court's finding that Hanna intentionally sought to mislead the government is not clearly erroneous. We see no basis for disturbing the enhancement under Guidelines §3C1.1. for obstruction of justice.

Hanna's challenge to the district court's rejection of her request for a downward departure on the ground of her cooperation is not reviewable because, *inter alia*, a refusal to depart is not appealable unless the court mistakenly believed it had no power to depart, *see, e.g., United States v. Mickens*, 977 F.2d at 72; *United States v. Ritchey*, 949 F.2d at 63; *United States v. Richardson*, 923 F.2d at 15. The record in the present case gives no indication that the court believed it lacked authority.

3. LATOUF: Latouf was convicted of possession with intent to distribute more than 100 grams of a substance containing heroin, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(i). She was sentenced principally to 235 months' imprisonment, to be followed by a four-year term of supervised release. On appeal, she contends that the district court erred in not granting her a two-point reduction in offense level for acceptance of responsibility. This contention is meritless. The district court found that Latouf perjured herself during the sentencing hearing; in light of this perjury, the court

found that Latouf had not accepted responsibility for her conduct. These findings are not clearly erroneous, and the court's conclusion that Latouf had not accepted responsibility sufficient to warrant a reduction in offense level is entitled to substantial deference, *see* §3E1.1, Application Note 5; *United States v. Tillem*, 906 F.2d 814, 828 (2d Cir. 1990).

4. NICHOLAS: Nicholas was convicted on one count of possession with intent to distribute more than one hundred grams of a substance containing heroin, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(i), and one count of structuring monetary transactions, in violation of 31 U.S.C. §5324(3) and 5322(b). He was sentenced principally to a total of 210 months' imprisonment, to be followed by a four-year term of supervised release. On appeal, he contends principally that the court erred in not granting him a two-point reduction in offense level for acceptance of responsibility and in imposing a three-level enhancement for his role in the offense. These contentions lack merit. The district court found that Nicholas had "persistent[ly] and characteristic[ly] dissembl[ed]" and had failed to offer a "forthright, unequivocal and candid acknowledgment" of his guilt. These findings are not clearly erroneous, and the court's conclusion that Nicholas had not accepted responsibility is entitled to substantial deference, *see* §3E1.1, Application Note 5; *United States v. Tillem*, 906 F.2d at 828. Nor may we disturb the court's finding that Nicholas was a manager or supervisor, given the evidence that Nicholas recruited and paid couriers in a criminal activity that involved more than five participants. *See* Guidelines §3B1.1(b).

We have considered all of defendants' arguments that are properly before us and have found them to be without merit. The judgments of conviction are affirmed.

WILLIAM H. TIMBERS
WILLIAM H. TIMBERS, *U.S.C.J.*

AMALYA L. KEARSE
AMALYA L. KEARSE, *U.S.C.J.*

GEORGE C. PRATT
GEORGE C. PRATT, *U.S.C.J.*

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

Order Issued by the United States Court of Appeals for the Second Circuit on June 7, 1993, Denying Petitioner's Petition for Rehearing and Indicating that no Judge of the Court Requested a Vote Pursuant to Petitioner's Suggestion for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of June one thousand nine hundred and ninety-three.

DOCKET NUMBER: 89-1477 (L)
89-1557

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

v.

MOUAWAD, *et al.*,
Defendants,

ELIAS FARAH, MICHAEL NICHOLAS, JOSEPH MOAWADH, MARY ANNE HANNA, ALMAZA LATOUF,
Defendants-Appellants,

ELIAS FARAH,
Defendant-Appellant-Cross-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant Joseph Mouawad, a/k/a Joseph Moawadh.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,

ELAINE B. GOLDSMITH, Clerk
By: CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell
Chief Deputy Clerk

(2)

FILED
NOV 8 1993
OFFICE OF THE CLERK

No. 93-366

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH MOUAWAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was reversible error under the Jencks Act, 18 U.S.C. 3500, for the government at a sentencing hearing not to provide the defendant with the notes made by a witness, when disclosure of the notes would have compromised a confidential informant, when the government provided the notes to the trial judge for *in camera* review, and when the judge concluded that the notes were consistent with the witness's testimony.

2. Whether the district court properly refused to grant petitioner's motion for a downward departure based on substantial assistance to the government.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unpublished, but the judgment is noted at 993 F.2d 1533 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1993. A petition for rehearing was denied on June 7, 1993. Pet. App. A9-A10. The petition for a writ of certiorari was filed on September 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of New York to one count of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of transporting monetary instruments out of the country, in violation of 18 U.S.C. 1956(a)(2)(A). Petitioner was sentenced to 292 months' imprisonment, to be followed by four years' supervised release. The court of appeals affirmed. Pet. App. A1-A8.

1. Petitioner was arrested in 1988 after a lengthy investigation revealed his role in a scheme to import large quantities of heroin from Lebanon to the United States. See Gov't C.A. Br. 4.

2. After petitioner pleaded guilty, a presentence report was prepared. When petitioner objected to matters in the report, the court ordered an evidentiary hearing. Gov't C.A. Br. 6. One of the witnesses at the hearing was Drug Enforcement Administration Agent Gary St. Hilaire. Mar. 29, 1989 Tr. 36-147. Much of St. Hilaire's testimony concerned information he had received from confidential informants. *E.g.*, *id.* at 49, 77-121, 144-147. During the direct examination, *id.* at 82, and at the end of the direct examination, *id.* at 148-149, petitioner, relying on the Jencks Act, 18 U.S.C. 3500, asked the government to produce any prior statements of the witness. The government declined to produce St. Hilaire's debriefing notes, explaining that they would compromise the identity of a confidential informant. Mar. 29, 1989 Tr. 150-151. After some discussion, the government furnished the requested material to the district court for *in camera* review. See Pet. App. A4. "The court found no conflict between the * * * material and the [agent's] testimony" and thus denied petitioner's request to inspect the agent's notes. See *ibid.*

At sentencing, petitioner moved for a downward departure based on what he considered to be substantial assistance to the government. June 7, 1989 Tr. 17-18. The court started from the premise that it would have the authority to make such a departure under Sentencing Guidelines § 5K2.0 "under exceptional circumstances" even in the absence of a government motion under Sentencing Guidelines § 5K1.1. June 7, 1989 Tr. 18-19. After extensive discussion of petitioner's motion, *id.* at 19-32, the court concluded that it was "not inclined to depart. That is my ruling." *Id.* at 32.

3. The court of appeals affirmed. Pet. App. A1-A8. With respect to petitioner's Jencks Act claim, the court noted that "[p]rior to the adoption of the Guidelines, the government had no obligation to produce Jencks Act material during sentencing," and stated that it "s[aw] no indication that the Sentencing Commission intended to alter this principle." *Id.* at A4. In any event, the court explained, the government furnished the material "to the court for *in camera* review," and "[t]he court found no conflict between the Jencks Act material and the testimony." *Ibid.* In those circumstances, the court concluded that there was "no abuse of discretion in the court's refusal to require the government to release the Jencks Act material to defendants." *Ibid.*

The court also affirmed the district court's refusal to depart downward in response to petitioner's substantial assistance motion. Pet. App. A4-A5. The court noted that "[a] refusal to depart is not appealable unless the court mistakenly believed it had no power to depart." *Id.* at A4. Because the district court clearly recognized that it could depart absent a motion from the government, but stated that a downward departure was unwarranted, the court of appeals found that "the refusal to depart is not reviewable." *Id.* at A5.

ARGUMENT

1. Petitioner first argues (Pet. 9-12) that the Jencks Act, 18 U.S.C. 3500, requires the government to produce the prior statements of its witnesses at a sentencing hearing. We disagree, but in any event the question does not warrant review here.

The Jencks Act does not require the production of a witness's prior statements "until [the] witness has testified *on direct examination in the trial of the case*." 18 U.S.C. 3500(a) (emphasis added). The natural import of the reference to testimony "in the trial of the case" is that the statute does not apply to testimony at a post-trial proceeding such as a sentencing hearing.[1] That understanding of the language is bolstered by Fed. R. Crim. P. 12(i), which requires the government to disclose the prior statements of its witnesses at a hearing on a motion to suppress evidence. Before the adoption of Rule 12(i), courts uniformly had held that the Jencks Act did not apply to pretrial hearings. See *United States* v. *Sebastian*, 497 F.2d 1267, 1268-1270 (2d Cir. 1974); *United States* v. *Murphy*, 569 F.2d 771, 772-774 (3d Cir.), cert. denied, 435 U.S. 955 (1978); *United States* v. *Montos*, 421 F.2d 215, 220-221 (5th Cir.), cert. denied, 397 U.S. 1022 (1970); *United States* v. *Spagnuolo*, 515 F.2d 818, 820 (9th Cir. 1975). Hence, Rule 12(i) was adopted to extend the government's disclosure obligation to hearings on a motion to suppress.

The Second Circuit, in a pre-Guidelines case, applied the same analysis in determining that the Jencks Act does not require the government to produce prior statements of witnesses who testify at sentencing hearings.

---

[1] In any event, it is not clear to us that the notes sought by petitioner were "statements" of St. Hilaire for purposes of the Jencks Act. See *Palermo* v. *United States*, 360 U.S. 343, 352-353 (1959).

United States v. *Fatico*, 603 F.2d 1053, 1056, 1058 (1979), cert. denied, 444 U.S. 1073 (1980). The court in this case followed *Fatico*, based on its view that there was "no indication that the Sentencing Commission intended to alter this principle." Pet. App. A4.

Petitioner correctly notes that the Third Circuit has held that the Jencks Act does require the government to produce prior statements of its witnesses at sentencing hearings. *United States* v. *Rosa*, 891 F.2d 1074, 1076-1079 (1989). For three reasons, however, the question does not warrant review in this case. First, the Third Circuit's decision rested on its understanding of Second Circuit law, drawn from dictum in the district court's decision in *United States* v. *Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978). See *Rosa*, 891 F.2d at 1077. As explained above, however, the Second Circuit made it clear on appeal in the *Fatico* case that the Jencks Act does not require production of the prior statements of witnesses at sentencing hearings. 603 F.2d at 1056, 1058. Accordingly, given the mistaken premise on which *Rosa* rests, there is considerable doubt that the Third Circuit will follow that decision in the future.

Second, the government's need to protect the identity of its confidential informant renders this an unusual case. The effect on the Jencks Act analysis of the harm of disclosing the informant's identity, cf. *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957) (discussion of government's privilege to refrain from disclosing identity of confidential informer), makes it unlikely that review of the analysis in this case would provide useful guidance to courts considering the more common situation, where disclosure of Jencks Act material would not harm important governmental interests.

Third, whatever the merits of petitioner's argument, it is apparent that any error was harmless. As the court of appeals noted, the district court reviewed the materials

and concluded that there was no conflict between the materials and the testimony offered at petitioner's sentencing hearing. Pet. App. A4. It is well settled that a Jencks Act violation can be harmless error, particularly when the trial court has reviewed the materials *in camera*. See, *e.g.*, *United States* v. *Lam Kwong-Wah*, 924 F.2d 298, 309-310 (D.C. Cir. 1991). Petitioner offers no basis for supposing that the district court erred in evaluating the materials. Accordingly, petitioner's Jencks Act claim does not warrant review.

2. Petitioner also argues (Pet. 13-15) that the district court erred in declining to depart downward based on what petitioner believed to be substantial assistance to the government; in petitioner's view, the district court erred by failing to recognize that substantial assistance can justify a departure under Sentencing Guidelines § 5K2.0 even without extraordinary circumstances. That claim is meritless.

Sentencing Guidelines § 5K2.0 implements the congressional mandate that a district court can depart from the sentencing range prescribed by the Sentencing Guidelines only if it finds a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). Because the Sentencing Commission explicitly considered the circumstances in which a departure would be warranted on the basis of assistance to the government (in Sentencing Guidelines § 5K1.1), departure on the basis of assistance to the government under Sentencing Guidelines § 5K2.0 would be appropriate only in "unusual" circumstances. Sentencing Guidelines § 5K2.0; see U.S. Sentencing Comm'n, *Guidelines Manual* 5-6 (1992) (departure is appropriate only in "atypical" and "unusual" cases in which "conduct significantly differs from the norm").

Petitioner does not suggest that any federal court outside the Second Circuit has authorized such a departure without some showing of unusual circumstances.[2] Petitioner's claim accordingly does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

NOVEMBER 1993

[2] Petitioner errs in relying (Pet. 14-15) on the Second Circuit's earlier decision in *United States* v. *Khan*, 920 F.2d 1100 (1990), cert. denied, 499 U.S. 969 (1991). In *Khan*, the defendant asserted that he warranted a downward departure under Section 5K2.0—even though the government had not moved for such a departure below—because he had allegedly saved a confidential informant's life. The court agreed that such a situation might warrant consideration under Section 5K2.0 "[b]ecause rescuing confidential informants from the jaws of death is not a grounds for departure taken into account by the Guidelines." 920 F.2d at 1107. The court did not state that substantial assistance to the government could justify a departure without unusual circumstances; it is plausible to read the court's opinion as implicitly concluding that the defendant's alleged conduct did present unusual circumstances. See *ibid.* In any event, any tension between *Khan* and the decision in this case presents a problem to be resolved by the Second Circuit, not this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).